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# State Office of Administrative Hearings

Kristofer S. Monson  
Chief Administrative Law Judge

**November 9, 2021**

**TO: Stephen Journey, Commission Counsel  
Commission Advising and Docket Management  
William B. Travis State Office Building  
1701 N. Congress, 7th Floor  
Austin, Texas 78701**

**VIA EFILE TEXAS**

**RE: SOAH Docket No. 473-21-0538  
PUC Docket No. 51415**

***Application of Southwestern Electric Power Company for Authority  
to Change Rates***

On August 27, 2021, the undersigned Administrative Law Judges (ALJs) issued the Proposal for Decision (PFD) in this case.<sup>1</sup> Exceptions to the PFD were filed on September 13, 2021, by intervenor East Texas Saltwater Disposal Company and on October 7, 2021, by Southwestern Electric Power Company (SWEPCO), the Public Utility Commission of Texas (Commission) staff (Staff), and intervenors Cities Advocating Reasonable Deregulation (CARD), Office of Public Utility Counsel (OPUC), Sierra Club, Texas Cotton Ginners' Association (TCGA), and Texas Industrial Energy Consumers (TIEC).<sup>2</sup> Replies to Exceptions were filed on October 28, 2021, by SWEPCO, Staff, and intervenors CARD, OPUC, TIEC, Eastman Chemical Company (Eastman), East Texas Electric Cooperative, Inc., Northeast Texas Electric Cooperative, Inc., and Nucor Steel Longview LLC. Staff filed a supplement to its Reply on November 3, 2021.

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<sup>1</sup> The fourth co-author of the PFD, ALJ Steven H. Neinast, retired from the State Office of Administrative Hearings in September 2021 and did not participate in responding to the parties' exceptions.

<sup>2</sup> Sierra Club filed its exceptions shortly after the Commission's 3 p.m. filing cut-off, along with a motion requesting that the Commission accept its exceptions despite the late filing. No objections to the timing of the exceptions were filed, although SWEPCO opposed their substance. In the event that the Commission grants Sierra Club's motion to allow the late filing, the ALJs have considered Sierra Club's exceptions and would not recommend any changes to the PFD in response to them. Nor do the ALJs specifically discuss them in this letter, as they are fully addressed in the ALJs' prehearing rulings and the PFD.

Most of the Exceptions and Replies to Exceptions raise arguments that were fully considered by the ALJs and discussed in the PFD and are not addressed again here. In this letter, the ALJs recommend certain adjustments to the Dolet Hills Rate Rider; specify a class-allocation methodology for refunding the excess accumulated deferred federal income taxes (ADFIT); respond to SWEPCO's concerns regarding a potential Internal Revenue Service (IRS) normalization violation; address TIEC's proposal that the Commission decline to adopt part of the PFD regarding SWEPCO's transmission costs; address two class-allocation issues raised by TCGA; and address whether, as TIEC and CARD urge, the Commission should address the rate impact of a recent opinion by the Third Court of Appeals regarding SWEPCO's Turk plant.

### ***Dolet Hills Rate Rider***

Although the primary cost-recovery issues related to the Dolet Hills Power Station are already addressed extensively in the PFD and are not revisited here,<sup>3</sup> the Exceptions and Replies suggest a need for some clarification and refinement regarding the precise content of the Dolet Hills Rate Rider.

The ALJs' overarching intent was to recommend that all cost recovery associated with the Dolet Hills plant be removed from SWEPCO's base rates and addressed in the Dolet Hills Rate Rider, with SWEPCO being permitted the full extent of cost recovery normally associated with an operational, used-and-useful power plant until the plant's December 31, 2021 retirement (*i.e.*, the "Operational-Plant Phase," as termed in the PFD), and thereafter (in the "Post-Retirement Phase") recover only the value of its investment in the plant amortized over the 2046 estimated useful life. Consistent with this intent, the ALJs would adopt SWEPCO's alternative proposals to include ADFIT and materials and supplies associated with Dolet Hill in the Dolet Hills Rate Rider, along with the estimated demolition costs. Conversely, the ALJs would not adopt SWEPCO's proposal that it recover carrying costs on the rider beginning in 2022, as this would effectively permit SWEPCO to earn a return on the plant during the Post-Retirement Phase.

Also, the ALJs find reasonable and would adopt SWEPCO's proposal that the Dolet Hills Rate Rider include a true-up mechanism to update the net book value of Dolet Hills after its retirement and again after the plant is closed and final demolition costs are known. This mechanism would also address the concerns raised by Staff regarding use of estimated rather than actual demolition costs.

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<sup>3</sup> However, as CARD correctly observes, the quotes from the Commission's findings in Docket No. 46449, which appear on PFD pages 24 and 50, were intended to read, "[a]llowing [the utility] a return *of*, but not *on*, its remaining investment' in that plant." (Emphases added).

The ALJs would further adopt SWEPCO's proposal to remove amortization of the Oxbow investment from the Post-Retirement Phase of the Dolet Hills Rate Rider, based on SWEPCO's representation that such amortization would result in a double-recovery.<sup>4</sup> Accordingly, the ALJs would make the following changes to the Findings of Fact (FoFs):

FoF 60. With respect to the period after December 31, 2021 (the Post-Retirement Phase of the Dolet Hills Rate Rider), the remaining net book values of Dolet Hills ~~and of the Oxbow investment~~ should be placed in a regulatory asset to be amortized without a return. All other cost recovery for Dolet Hills, the Oxbow investment, or DHLC under the Dolet Hills Rate Rider should cease, as the assets will no longer be providing service.

Similarly, the ALJs would delete FoF 62 ("SWEPCO's recovery of its Oxbow investment following the Dolet Hills retirement should be amortized according to the same schedule as with the Dolet Hills plant.").

### ***Excess ADFIT***

The ALJs find reasonable and would adopt TIEC's proposals regarding a class-allocation methodology for the refund of excess ADFIT, which no party opposed. Accordingly, the ALJs would add the following new FoF 89A:

FoF 89A. The excess ADFIT refund should be allocated to rate classes in proportion to the amount of allocated ADFIT in the class cost of service study (CCOSS), and each rate class should receive its full share of the refund. The application of any excess ADFIT credits against any amounts owed because of the relate-back of the rates approved in this proceeding should thus be conducted on a class-by-class basis.

### ***Net Operating Loss Carry-Forward (NOLC) ADFIT***

For the reasons set forth in the PFD, the ALJs remain of the view that SWEPCO should not be permitted to recognize the \$455 million in NOLC ADFIT after having received payment for the asset and invested those funds in rate base. However, the ALJs are persuaded to adopt—in an abundance of caution—SWEPCO's second alternative proposal for addressing the asserted risk of a normalization violation if SWEPCO is not permitted to include the NOLC ADFIT in rate base, a proposal that Staff also

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<sup>4</sup> OPUC urges that cost recovery for both the Oxbow investment and Dolet Hills Lignite Company (DHLC) should be eliminated entirely, in the view that these assets ceased being used and useful in providing service when mining operations ended. OPUC made the same argument in its post-hearing briefing, and the ALJs have addressed it in the PFD.

recommends. Namely, the Commission would authorize SWEPCO to create a regulatory asset to track the return that would be associated with the inclusion of the NOLC ADFIT in rate base, pending a resolution with the IRS regarding potential normalization violations. To that end, the ALJs would propose that the Commission add the following ordering paragraph to its final order:

Notwithstanding Finding of Fact Nos. 80-83, SWEPCO is authorized to establish a regulatory asset for the return that would be associated with inclusion of SWEPCO's stand-alone NOLC ADFIT in the calculation of rate base, as well as the net excess amortization of excess ADFIT in the calculation of the cost of service, with an effective date equal to that of the rates being implemented in this proceeding—March 18, 2021. SWEPCO will be eligible to request recovery of that regulatory asset once it receives an IRS determination that removal of the stand-alone NOLC ADFIT from the calculation of rate base constitutes a normalization violation. If the IRS determines that such removal does not constitute a normalization violation, the regulatory asset will be written-off and not recovered from customers.

***Allocated Transmission Expenses Related to Retail Behind-the-Meter Generation (BTMG)***

TIEC's exceptions contend that a portion of the PFD addressing recovery of SWEPCO's Network Integration Transmission Service (NITS) charges from the Southwest Power Pool (SPP) is "dicta" that the Commission should not adopt. However, as discussed below, the language cited by TIEC is not dicta, as it supports inclusion of contested costs in SWEPCO's revenue requirement.

As discussed in the PFD, SWEPCO's NITS charges increased after SWEPCO began reporting Eastman's retail BTMG load to SPP as part of SWEPCO's monthly Network Load. TIEC and Eastman challenged the charges on several grounds, including that the change in how SWEPCO reports monthly Network Load was contrary to SPP's Open Access Transmission Tariff (OATT).

The ALJs' analysis of this issue is divided into two parts. First, the ALJs concluded that the Federal Energy Regulatory Commission (FERC) has exclusive jurisdiction to resolve disputes regarding FERC-approved tariffs, such as the SPP OATT, and that SWEPCO's NITS charges were reasonable as a matter of law under the filed-rate doctrine. Thus, the NITS charges are recoverable. Second, the ALJs found that SWEPCO's proposed method of recovering the increased NITS charges—i.e., adding Eastman's retail BTMG load to the Texas jurisdiction when performing the jurisdictional allocation of transmission costs—was not shown to be reasonable, necessary, and non-discriminatory. In its exceptions, TIEC argues that, because SWEPCO's requested revenue requirement was reduced based on the second part of the ALJs' analysis, the first part of the analysis

(specifically pages 192 to 194 of the PFD) was not necessary to the PFD's recommendation.

However, the first part of the analysis addresses whether SWEPCO's NITS charges are recoverable, which was a contested issue in this case. While the ALJs recommend an adjustment to SWEPCO's proposed jurisdictional allocation, it does not result in a complete disallowance of the increased NITS charges at issue. The NITS charges are among the transmission costs allocated to the Texas jurisdiction, and thus, a portion of the increased NITS charges would be included in SWEPCO's Texas revenue requirement under the ALJs' recommendation. As such, the first part of the PFD's analysis is necessary to support SWEPCO's recovery of these costs, which was a contested issue.

The remainder of the exceptions on this issue are fully addressed in the PFD, and the ALJs do not recommend any changes.

### ***TCGA's Class-Allocation Issues***

TCGA's exceptions raise two class-allocation issues. First, TCGA requests certain "simple adjustments" to the class allocators to address the unique characteristics of the Cotton Gin class that were recognized in the PFD. The ALJs, however, do not recommend adopting TCGA's specific changes, as they were proposed for the first time in exceptions and only address the cost to serve the Cotton Gin class on a piecemeal basis. Instead, the ALJs continue to recommend that SWEPCO address these issues in its next rate case, where a comprehensive analysis of the cost to serve the Cotton Gin class can be conducted.

Second, TCGA requests that the 43.26% cap applied to the Cotton Gin class in the revenue distribution be reduced to 24.32% to account for the lower revenue-requirement increase recommended in the PFD. However, with the cap proposed in the PFD, the Cotton Gin class is already receiving a significant subsidy paid for by other customers, and the subsidy would increase further if TCGA's exceptions were accepted. For this reason, the ALJs recommend retaining the cap in the PFD.

### ***Pending Appeal of PUC Docket No. 40443***<sup>5</sup>

On September 1, 2021, after the PFD was issued, TIEC and CARD filed a letter alerting the ALJs to a recent opinion by the Third Court of Appeals arising from the prior SWEPCO rate case that concluded in 2014, Docket No. 40443.<sup>6</sup> In the opinion, the Third

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<sup>5</sup> Because ALJ Cassandra Quinn participated in an earlier phase of the appeal of Docket No. 40443 while working at OPUC, she did not participate in regard to this issue.

<sup>6</sup> *Texas Industrial Energy Consumers v. Pub. Util. Comm'n*, Cause No. 03-17-00490-CV, 2021 WL 3518884 (Tex. App.—Austin Aug. 11, 2021, no pet. h.) (mem. op.).

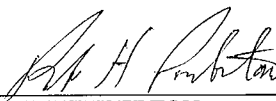
Court ruled that the Commission erred by not including allowance for funds used during construction (AFUDC) in the cost cap established in a prior docket applicable to SWEPCO's coal-fired Turk power plant. Although this issue was not litigated in the present docket, nor addressed in the PFD, TIEC and CARD propose that the rate impact of the Third Court's decision should be addressed in this docket and request that the ALJs recommend in their exceptions letter that the Commission do so. TIEC reurged the same contention in its exceptions. SWEPCO opposes these proposals, citing (among other considerations) that the appellate process has not yet concluded and representing that it intends to file a petition for review with the Texas Supreme Court.

Given the non-final and potentially uncertain status of the Third Court's ruling, as well as the state of the record in this docket, the ALJs decline to recommend that the Commission address the rate effects of that ruling in this docket. The ALJs would also observe that the Third Court's ruling, if it stands, would remand the matter to the Commission for further proceedings. That proceeding, the ALJs would submit, would be the appropriate context in which the Commission could address the issues related to the Turk plant, issues that have heretofore been entirely foreign to this docket.

With the changes described in this letter, the PFD is ready for your consideration.



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STATE OFFICE OF ADMINISTRATIVE HEARINGS



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xc: All Parties of Record